Chin Wooi Keat v Isberg Corp Sdn Bhd (in receivership) & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S22–672 OF 2010
SM KOMATHY JC
27 JANUARY 2014

Civil Procedure — Summary judgment — Application for — Receiver taking possession of machinery and exercising dominion over it — Opposition to application — Omission to indicate rule under which application was made — Whether omission rendered application defective — Whether defendant misled by omission — Whether summary judgment could be sought for conversion — Whether there were triable issues — Whether trespass and conversion committed — Damages — Measure of damages — Whether plaintiff entitled to recover damages for fall in value of machinery — Whether proper case to award exemplary damages

The plaintiff had entered into a lease agreement, to lease certain machinery to the first defendant for a period of 24 months at a monthly rental of RM10,000. The receiver and manager (the second defendant), who was appointed over the first defendant, took the position that the machinery was an asset belonging to the first defendant. Despite being notified of the plaintiff's rights to the machinery, the second defendant proceeded to arrange for the sale of the machinery. Consequently the plaintiff filed an action against the defendants claiming, inter alia, the return of the machinery and damages for the tort of conversion. The plaintiff also obtained an order of court to remove the machinery from the first defendant's factory. However, the second defendant continued to make matters difficult for the plaintiff thereby necessitating the need for the plaintiff to apply for a further court order allowing him access to the factory for the purposes of removing the machinery. The second court order gave the plaintiff the necessary right to enter the factory, dismantle the machinery and remove it from the factory. When the question of whether the machinery was covered by the debenture was tried as a preliminary issue, the court decided that the machinery was not caught under the debenture and belonged to the plaintiff. Following this decision, the plaintiff discontinued his claim against the first defendant and filed the present application for summary judgment against the second defendant. This application was based on the grounds that the second defendant upon his appointment as receiver had taken possession of the machinery and had exercised dominion over it by attempting to sell it and deprive the plaintiff of its use and possession. The second defendant opposed this application on, inter alia, the grounds that the application was defective as it omitted to state the relevant rule under which it was made; that the application was not maintainable under O 14 of the Rules

of Court 2012 ('ROC') because it was based on fraud; that there were numerous triable issues that warranted a dismissal of the application; that there had been no trespass or conversion committed; and that when the plaintiff's action against the first defendant had been discontinued his action against the second defendant could no longer be maintained. The plaintiff maintained that the loss and damage he had suffered was in consequence of the acts of the second defendant, and thus he had a claim against the latter.

Held, allowing the application with costs in the sum of RM20,000:

(1) The two cases cited and relied upon by the second defendant, in support of its proposition that the omission to state that the present application for summary judgment was made pursuant to O 14 of the ROC rendered the application defective, had no application to the present case. This was because in those two cases there was a failure to state the relevant rule in the originating process, whereas in the present case the omission to indicate the relevant rule related to the application. In any case, the second defendant's own affidavit in opposition clearly stated that the plaintiff's application was not fit for summary adjudication. Thus, the second defendant had not been misled by the omission (see para 19).

(2) The second defendant's objection to the claim being expressly precluded from summary judgment under O 14 r 1(2) of the ROC because it was based on an allegation of fraud had to be rejected. There was no allegation of fraud in the plaintiff's statement of claim or in the affidavit in support of this application. A claim based on the tort of conversion was a tort of strict liability (see para 20).

(3) The triable issues referred to by the second defendant had already been raised and argued during the hearing of the preliminary issue, which was decided in favour of the plaintiff. In the circumstances, there were no triable issues that warranted a dismissal of the present application. Further, although the decision on the preliminary issue was under appeal, it is trite law that an appeal did not operate as a stay of the decision. As such, the plaintiff was entitled to make the present application (see para 22).

(4) The plaintiff's cause of action based on trespass was unmaintainable as the machinery was not in the possession of the plaintiff at the material time (see para 25).

(5) The present case was neither a case of mere unauthorised retention of the machinery nor a case of mere denial of the title of the plaintiff. Instead, the second defendant had attempted to sell the machinery that belonged to the plaintiff and also denied the plaintiff the use of for about five years. In doing these wrongful acts, he had asserted rights inconsistent with the plaintiff's rights as owner. This was a clear case of conversion and the

second defendant was liable for conversion of the machinery from 22 July 2008, ie when he was appointed as receiver and exercised dominion over the machinery, until May 2013 (see para 31).

(6) When the second defendant was appointed as a receiver of the first defendant company, he became an officer of the company. An officer of a company is liable if he procures the commission of a tort by the company. In the present case, the second defendant had taken possession of the machinery, attempted to sell it and also deprived the plaintiff of its use and possession. In the circumstances, he should be made personally liable for the wrongful acts of the first defendant (see para 35).

(7) The prima facie measure of damages for conversion is the market value of the goods at the time the wrongdoer expropriated them as this would represent the basic loss sustained by the owner. Upon applying the principles from the cases cited, the plaintiff was clearly entitled to the deterioration the machinery had suffered while they were retained by the second defendant for about five years. Further, based on the evidence, the plaintiff was not only entitled to recover damages for the fall in the value of the machinery, but also damages for loss of use and loss of spare parts. However, this was not a case to award exemplary damages (see paras 41 & 46).

[Bahasa Malaysia summary

Plaintif telah memasuki perjanjian pajakan untuk memajak beberapa mesin kepada defendan pertama bagi tempoh 24 bulan dengan sewa bulanan sebanyak RM10,000. Penerima dan pengurus ('defendan kedua') yang dilantik oleh defendan pertama, melihat bahawa mesin tersebut adalah aset milik defendan pertama. Walaupun telah dimaklumkan mengenai hak plaintif ke atas mesin, defendan kedua meneruskan untuk menjual mesin tersebut. Akibatnya, plaintif memfailkan satu tindakan terhadap defendan-defendan bagi menuntut, antara lain, pemulangan mesin dan ganti rugi bagi tort konversi. Plaintif juga mendapatkan perintah mahkamah untuk mengeluarkan mesin dari kilang defendan pertama. Walau bagaimanapun, defendan kedua terus mengeruhkan lagi keadaan kepada plaintif menyebabkan plaintif perlu memohon satu perintah mahkamah untuk membenarkan akses ke atas kilang bagi tujuan mengeluarkan mesin tersebut. Perintah kedua mahkamah memberikan plaintif hak yang diperlukan untuk memasuki kilang, membuka dan mengeluarkan mesin tersebut dari kilang. Apabila persoalan sama ada mesin tersebut dilindungi oleh debentur dibicarakan sebagai isu awalan, mahkamah memutuskan bahawa mesin tidak terjumlah di bawah debentur dan dimiliki oleh plaintif. Berikutan keputusan ini, plaintif tidak meneruskan dengan tuntutannya terhadap defendan pertama dan memfailkan permohonan ini bagi penghakiman ringkas terhadap defendan kedua. Permohonan ini adalah atas dasar bahawa defendan kedua, dengan pelantikannya sebagai penerima, telah memiliki mesin tersebut dan

menjalankan penguasaan ke atasnya dengan cuba untuk menjualnya dan menghalang plaintif daripada menggunakannya dan memilikinya. Defendan kedua membantah permohonan ini, antara lain, atas dasar bahawa permohonan adalah cacat kerana ia tidak menyatakan aturan yang relevan yang mana di bawahnya ia dibuat; bahawa permohonan tidak boleh dikekalkan di bawah A 14 Kaedah-Kaedah Mahkamah 2012 (KKM) kerana ia adalah berdasarkan penipuan; bahawa terdapat beberapa isu yang boleh dibicarakan yang mewajarkan penolakan permohonan; bahawa tidak terdapat pencerobohan atau konversi; dan bahawa apabila tindakan plaintif terhadap defendan pertama tidak diteruskan, tindakannya terhadap defendan kedua tidak lagi boleh dikekalkan. Plaintif menghujahkan bahawa kerugian dan kerosakan yang dialaminya adalah akibat tindakan-tindakan defendan kedua, dan dengan itu menuntut terhadap defendan kedua.

Diputuskan, membenarkan permohonan dengan kos sebanyak RM20,000:

(1) Dua kes yang dinyatakan dan disandarkan oleh defendan kedua, bagi menyokong cadangan bahawa ketinggalan untuk menyatakan bahawa permohonan penghakiman ringkas ini dibuat di bawah A 14 KKM menyebabkan permohonan cacat, tidak terpakai dalam kes ini. Ini kerana dalam dua kes tersebut, terdapat kegagalan untuk menyatakan aturan yang relevan dalam proses pemula, manakala dalam kes ini, ketinggalan untuk menyatakan aturan yang relevan adalah berkaitan dengan permohonan. Dalam apa jua keadaan, afidavit menentang defendan kedua sendiri dengan jelas menyatakan bahawa permohonan plaintif tidak sesuai bagi penghakiman ringkas. Oleh itu, defendan kedua tidak terpedaya dengan ketinggalan tersebut (lihat perenggan 19).

(2) Bantahan defendan kedua bahawa tuntutan dengan nyata terkecuali daripada penghakiman ringkas di bawah A 14 k 1(2) KKM kerana ia berdasarkan dakwaan penipuan perlu ditolak. Tidak terdapat dakwaan penipuan dalam penyata tuntutan plaintif atau dalam afidavit sokongan permohonan ini. Tuntutan berdasarkan tort konversi adalah tort liabiliti ketat (lihat perenggan 20).

(3) Isu-isu yang boleh dibicarakan oleh defendan kedua telah dibangkitkan dan dihujahkan ketika perbicaraan isu awalan yang telah diputuskan berpihak kepada plaintif. Dalam hal keadaan sedemikian, tidak terdapat isu-isu yang boleh dibicarakan yang mewajarkan penolakan permohonan ini. Selanjutnya, walaupun keputusan isu awalan adalah dalam rayuan, adalah undang-undang matan bahawa rayuan tidak berfungsi sebagai penggantungan keputusan. Dengan itu, plaintif berhak untuk membuat permohonan ini (lihat perenggan 22).

(4) Kausa tindakan plaintif berdasarkan pencerobohan tidak boleh dikekalkan kerana mesin tersebut bukan dalam milikan plaintif pada masa material (lihat perenggan 25).

(5) Kes ini bukanlah kes penahanan mesin yang tidak dibenarkan semata-mata mahupun satu kes penafian hak milik plaintif. Sebaliknya, defendan kedua cuba untuk menjual mesin milik plaintif dan menafikan plaintif daripada menggunakannya selama lima tahun. Dalam melakukan tindakan-tindakan salah ini, dia telah menjalankan haknya selaras dengan hak plaintif sebagai pemilik. Ini adalah kes konversi yang nyata dan defendan kedua bertanggungan bagi konversi mesin tersebut dari 22 Julai 2008, iaitu ketika dia dilantik sebagai penerima dan menjalankan penguasaan ke atas mesin hingga Mei 2013 (lihat perenggan 31).

(6) Apabila defendan kedua dilantik sebagai penerima syarikat defendan pertama, dia menjadi pegawai syarikat tersebut. Seorang pegawai syarikat adalah bertanggungan sekiranya dia melakukan tort terhadap syarikat. Dalam kes ini, defendan kedua telah memiliki mesin tersebut, cuba untuk menjualnya dan menafikan plaintif daripada menggunakannya dan memilikinya. Dalam hal keadaan sedemikian, dia sepatutnya bertanggungan secara peribadi bagi tindakan-tindakan salah defendan pertama (lihat perenggan 35).

(7) Taksiran prima facie ganti rugi bagi konversi adalah nilai pasaran barangan ketika pesalah mengekspropriasinya kerana ini menggambarkan ganti rugi asas yang dialami oleh pemilik. Dalam mengguna pakai prinsip-prinsip dalam kes yang dinyatakan, plaintif jelas berhak ke atas kerosakan mesin yang dialami ketika ia ditahan oleh defendan kedua selama lima tahun. Selanjutnya, berdasarkan keterangan, plaintif bukan sahaja berhak untuk mendapatkan ganti rugi bagi kejatuhan nilai mesin tetapi juga bagi ganti rugi kehilangan penggunaan dan kerugian alat gantian. Walau bagaimanapun, ini bukanlah kes untuk mengawardkan ganti rugi teladan (lihat perenggan 41 & 46).]

Notes

For cases on application for summary judgment, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 8879–8950.

Cases referred to

A-G v Blake (Jonathan Cape Ltd third party) [2000] 3 WLR 625, HL (refd)

Barclays Mercantile Business Finance Ltd and another v Sibec Developments Ltd and others [1993] 2 All ER 195, Ch D (refd)

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457; [1995] 4 CLJ 127, CA (not folld)

Clough Mill Ltd v Martin [1984] 3 All ER 982; [1985] 1 WLR 111, CA (refd)

Development and Commercial Bank Berhad v Liew Weng Hang & Ors [2007] 6 CLJ 260 (refd)

Express Newspapers plc v News (UK) Ltd and Others [1990] 3 All ER 376, Ch D

General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd [1963] 1 WLR 644, CA (refd)
Kuddus v Chief Constable of the Leicestershire Constabulary [2001] UKHL 29; [2002] 2 AC 122, HL (refd)
Kuwait Airways Corp v Iraqi Airways Co [2002] 2 AC 883, HL (folld)
Marfani & Co Ltd v Midland Bank Ltd [1968] 1 WLR 956, CA (refd)
Perbadanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor [1982] 2 MLJ 165; [1982] CLJ (Rep) 257, FC (refd)
Pua Siong Hoe v RHB Bank Bhd & Anor; Persatuan Pemilik Tanah Taman Pandan (Intervenor) [2001] 6 CLJ 326, HC (refd)
Sajan Singh v Sardara Ali [1960] 1 All ER 269; [1960] AC 167, PC (refd)
Stoke-on-Trent City Council v WJ Wass Ltd [1988] 3 All ER 394, CA (refd)
Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd [1952] 1 All ER 796; [1952] 2 QB 246, CA (refd)
Sunkyong International Inc v Malaysia Rubber Development Corporation Bhd [1992] 2 MLJ 146, SC (not folld)
Owner of Cargo lately Laden on Board of the Ship or Vessel 'Ta Veechai Marine', The v The Owners of and another Person Interested in the Ship or Vessel 'Ta Veechai Marine' [1995] 1 CLJ 720, HC (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14 r 1(2)
Sale of Goods Act 1957 s 4(3)

CM Owee (Owee & Ho) for the plaintiff.
V Mugunthan (Jaafar & Menon) for the defendant.

SM Komathy JC:

THE APPLICATION

[1] This application raises issues concerning the essential elements of the tort of trespass and conversion and the damages recoverable.

[2] The application is made by the plaintiff by way of notice of application dated 25 November 2013 for summary judgment on the issue of liability pursuant to O 14 of the Rules of Court 2012 ('ROC') against the second defendant and for damages to be assessed. Judgment on liability is sought for the tort of trespass, conversion and breach of duty in wrongfully taking possession of machinery that had been leased to the first defendant. It is supported by an affidavit affirmed by him on 22 November 2013.

[3] The orders the plaintiff seeks in this application are:

(a) that a final judgment be entered against the second defendant in favour of the plaintiff's liability for the plaintiff's claim for tort of trespass and conversion against the machinery that is the subject of the plaintiff's claim as pleaded in statement of claim;

(b) that a final judgment be entered against second defendant in favour of the plaintiff for breach of a duty of care by the second defendant towards the plaintiff;

(c) further to the reliefs in paragraphs (i) and (ii) above, the second defendant is required to pay the plaintiff damages and exemplary damages assessed by this Honourable Court together with interest thereon for the period and at the rate set by the Honourable Court; and

(d) that the costs of this application and claim be paid by the second defendant to the plaintiff.

BACKGROUND

[4] The basic facts giving rise to this application are that pursuant to a lease agreement, the plaintiff, had leased to the first defendant the machinery which formed the subject matter of this action, for a period of 24 months from 1 February 2006 at a monthly rental of RM10,000 a month. The second defendant was the receiver and manager appointed over the first defendant pursuant to a debenture. The second defendant took the position that the machinery was an asset belonging to the first defendant and was covered by the debenture and he refused to acknowledge the plaintiff's rights to the machinery under the lease agreement.

[5] The second defendant then proceeded to sell the machinery despite being notified by the plaintiff of his rights to the machinery. By letter dated 2 April 2010, the second defendant wrote to Insolvency Department informing it that the machinery had been sold to Seri JB Enterprise for RM400,000.

[6] On 19 July 2010, the plaintiff instituted this action against the first and second defendants claiming, inter alia, the return of the machinery and damages for the tort of trespass, conversion and negligence.

[7] Pursuant to an order of court dated 19 August 2010, the plaintiff was allowed to remove the machinery from the factory. The order was is these terms:

(1) Bahawa Jentera tersebut hendaklah dikeluarkan oleh plaintif dari Hartanah itu dalam tempoh empat belas (14) hari dari tarikh Perintah ini atau pada

masa seperti yang disetujui di antara parti-parti, jika gagal Defendan Kedua hendaklah mengeluarkan yang sama di mana kos dan perbelanjaan yang dikenakan berkenaan dengan pengeluaran tersebut hendaklah ditanggung oleh plaintif.

(2) Bahawa Jentera tersebut hendaklah disimpan di suatu gudang yang disetujui secara bersama untuk tujuan simpanan sementara menunggu pelupusan muktamad prayer 1 atau prayer 3 dan 7 Writ Saman dan Pernyataan Tuntutan bertarikh 19 Julai 2010 (Lampiran 1), di mana satu yang terlebih dahulu.

(3) Kesemua kos-kos yang dikena berkenaan dengan simpanan Jentera tersebut hendaklah ditanggung dan dikongsi secara bersama di antara plaintif dan defendan kedua termasuk perlindungan insurans berhubung dengan Jentera tersebut jika perlu; dan

(4) Tiada perintah terhadap kos.

[8] Despite the order of 19 August 2010, the plaintiff was not allowed to enter the factory to inspect the machinery for purposes of removal. It was only in March 2012 that the second defendant agreed to arrange for a joint inspection for purposes of removal of the machinery but insisted that the costs of storage being borne by the plaintiff. The plaintiff refused and consequently no joint inspection was conducted and the machinery remained in the factory.

[9] The plaintiff perforce had to apply for a further court order, and on 2 May 2013, the court directed the second defendant to give the plaintiff access to remove the machinery. Whereupon the plaintiff was given access and proceeded to dismantle the machinery and remove it from the factory.

[10] On 13 August 2013, I ordered that the question of whether the machinery was covered by the debenture be tried as a preliminary issue. In the meantime, the plaintiff discontinued his claim against the first defendant on 26 August 2013. On 6 November 2013, I ruled that the machinery was not caught under the debenture and belonged to the plaintiff.

[11] Following my decision on the preliminary issue, the plaintiff has filed the present application for summary judgment. The application was based on the ground that the second defendant upon his appointment as receiver and manager on 22 July 2008, had taken possession of the machinery and had exercised dominion over it by attempting to sell it and deprive the plaintiff of its use and possession.

SUBMISSIONS OF PARTIES

[12] The plaintiff contended that final judgment ought to be entered against

the second defendant on liability and for damages to be assessed as there was incontrovertible evidence that the latter had exercised dominion over the machinery which belonged to him. The actions of the second defendant had temporarily deprived him of the use and possession of the machinery. The second defendant had refused to release the machinery to him despite the court order of 19 August 2010. The acts of the second defendants amounted to trespass, conversion, and breach of duty. The plaintiff has suffered loss and damage in consequence of the wrongful retention of the machinery until May 2013.

[13] The second defendant opposed the application on the following main grounds:

(a) that the application was defective as it omitted to state the relevant rule under which it was made;

(b) that the application was not maintainable as an application for summary judgment based on fraud is expressly prohibited by O 14 of the ROC;

(c) there were numerous triable issues in this case, which warranted a dismissal of the application;

(d) no trespass had been committed by him as the plaintiff was never in lawful possession of the machinery at all material times;

(e) that there was no conversion as there was no sale of the machinery to Seri JB Enterprise within the meaning of s 4(3) of the Sale of Goods Act 1957;

(f) that he was an agent of the first defendant and as the action against the first defendant has been discontinued, the action against him can no longer be maintained;

(g) there was no evidence to establish that he had been negligent in the discharge of his duties;

(h) the decisions of the court on the preliminary issue and the court's refusal to allow an amendment of the defence are under appeal and pending determination in the Court of Appeal; and

(i) that the plaintiff has suffered no loss as he has taken back the machinery unconditionally.

Thus there are essentially nine issues between the parties — the substantive issues relate to conversion, trespass and negligence.

CONVERSION

[14] Conversion is an act of deliberate dealing in a chattel in a manner inconsistent with another's right whereby that other is deprived of the use and

possession of it. Conversion can be committed in a myriad of circumstances. In *Clerk & Lindsell on Torts* (20th Ed) the author states that the principal ways in which a conversion may take place can be set out under the following headings:

(a) when property is wrongfully taken or received by someone not entitled to do so;

(b) when it is wrongfully parted with;

(c) when it is lost by a bailee in breach of his duty to the bailor;

(d) when it is wrongfully retained;

(e) when it is wrongfully misused or destroyed; and

(f) when the defendant, without physically interfering with it, wrongfully denies access to the claimant.

[15] In the case of *""" procphrase=""" v" party2=""" The Owners of and another Person Interested in the Ship or Vessel """ Ta Veechai Marine""" """ > The Owner of Cargo lately Laden on Board of the Ship or Vessel 'Ta Veechai Marine' v The Owners of and another Person Interested in the Ship or Vessel 'Ta Veechai Marine'* [1995] 1 CLJ 720, Ian HC Chin J in addressing the law on conversion said (at p 735):

> There are three forms of conversion. See *Halsbury's Laws of England*, (4th Ed), Vol 45, para 1422. The first time form of conversion consists of a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights, and an intention in so doing to deny the owner's rights or to assert a right inconsistent with them. The second form of conversion consists of a wrongful detention of goods and the normal method of establishing a wrongful detention is to show that the plaintiff made a demand for the return of the goods and that the defendant refused after a reasonable time to comply with that demand. The third form of conversion consists of a loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor.

[16] On principle, a defendant is liable in conversion whether or not he knew, or had reason to know, that what he was doing infringed the plaintiff's rights. The law on this point was succinctly expressed by Diplock LJ in *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 at pp 970–971:

> At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions it matters not that the doer of the act or usurpation did not know, and could not by the exercise of any reasonable care have known of his neighbour's interest in the goods. This duty is absolute; he acts at his peril.

[17] The Malaysian Court of Appeal in *Development and Commercial Bank Berhad v Liew Weng Hang & Ors* [2007] 6 CLJ 260 expressed the same view;

In the first place it is important to bear in mind the nature of the causes of action that the plaintiff's relied upon. One of them is the tort of conversion. It is a tort of strict liability. Lord Chelmsford defined it as follows in *Hollins v Fowler* [1875] LR 7 HL 757:

> Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of then, whether for his own benefit or that of any other person, is guilty of a conversion.

It follows that mistake of law and, generally speaking, mistake of fact will not afford a defence to the tort. In *Hollins v Fowler*, Blackburn J when delivering his judgment in the Court of Exchequer said:

> However hard it may be on those who deal innocently and in the ordinary course of business with a person in possession of goods, yet, as long as the law as laid down in *Hardman v Booth* 1 H & C 803, is unimpeached, I think it is clear law, that if there has been what amounts in law to a conversion of the plaintiff's goods, by any one, however innocent, that person must pay the value of the goods to the real owners, the plaintiff's.

Because conversion is a tort of strict liability, the rule as to remoteness of damage governing it is that of direct consequences. In short, a tortfeasor who commits conversion is liable for all the harm that is the direct consequence of his act. Lord Summer in *Well-Blundell v Stephens* [1920] AC 956 described the direct consequence test follows:

> Direct cause excludes what is indirect, conveys the essential distinction, which causa cousans sine qua non rather cumbrously indicate, and is consistent with the possibility of the concurrence or more direct causes that one, operating at the same time and leading to a common result as in *Burrows v March Gas and Coke Co* (1872) LR 7 Exch 96 and *Hill v New River Co* (1868) 9 B & S 303; 18 LT 355.

DISCUSSION

Whether application defective

[18] The first issue raised by the second defendant is that there is an omission to indicate in the application the rule under which it is made. It is true that O14 of the ROC is not mentioned in the application. It was argued that the omission rendered the application defective and ought to be struck out as this is an essential requirement under the ROC. This is to ensure there is no surprise and to avoid an applicant shifting from one rule to another or from one statute to another. In support of this argument, reliance was placed on the decisions in *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; [1995] 4 CLJ 127 and *Pua Siong Hoe v RHB Bank Bhd & Anor* [2001] 6 CLJ 326. In the former case, Gopal Sri Ram JCA said (at pp 477–478 (MLJ); p 142 (CLJ)):

> The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitulement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to

> determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not.
>
> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise it would be an embarrassing pleading and be may be liable to be struck out, unless sooner amended.

[19] In response, the plaintiff argued that the omission was not fatal as the second defendant was not misled by it. This was evident from the affidavit in opposition filed by him to oppose the application which stated, 'affidavit jawapan permohonan plaintiff untuk permohonan terus.' This affidavit indicated that the second defendant was aware that this was an application under O 14 of the ROC for summary judgment. In support of his argument, the plaintiff relied on the decision of the Supreme Court in *Sunkyong International Inc v Malaysia Rubber Development Corporation Bhd* [1992] 2 MLJ 146. In that case, the Supreme Court observed (at p 150):

> The first issue was that nowhere in the supporting affidavit for the application for leave to issue the third party notice was set out the applicable relevant paragraphs as contained in O 11 r 1(1) set out above. It was submitted that two such paragraphs might be relevant and that they were para (f) and para (j) under O 11 r 1(1). In connection with para (f), it was submitted that the local defendant had not adduced evidence of how and when the contract was made, and that in regard to para Q), it was submitted that there was no evidence of where the contract was made between the local defendant and the foreign defendant or where the foreign defendant had committed the breach. It was submitted to the effect that even paras (j) and (f) did not apply.
>
> While it is always far better to quote section and verse or specific order or rule in any application, it is never fatal to any application to omit to do so where the applicant can bring himself within any relevant specific order or rule. Here the local defendant could and did bring its case under paras (f) and (j) m question.

[20] I accept as correct the plaintiff's submission that the principle articulated in the two cases cited by the second defendant would be applicable where there is a failure to state or identify in an originating process the relevant rule pursuant to which proceedings have been commenced. In the absence of

an indication in the intitulement in an originating process, a defendant would be misled and caught by surprise. In the present case, the omission to indicate the relevant rule relates to an application as opposed to an originating process. Hence, the two cases relied on by the second defendant have no application. The omission is not fatal as the affidavit in opposition clearly demonstrates that the second defendant was not under any illusion that the plaintiff's application is anything but a summary judgment application. The second defendant's own affidavit in opposition clearly states that the plaintiff's application is not fit for summary adjudication and that there are several triable issues. The point is therefore unsustainable.

Whether summary judgment can be sought for conversion

[21] The second issue is based on the contention that summary judgment is sought on an allegation of fraud. The tort of conversion, it is contended by the second defendant, is a specie of fraud. Order 14 r 1(2) expressly precludes summary judgment based on allegation of fraud. A perusal of the pleadings and the application shows that this contention is bereft of any factual support. There is no allegation of fraud in the statement of claim nor the affidavit in support of the application as contended. A claim based on the tort of conversion is a tort of strict liability. The objection is untenable and must be rejected.

Whether there are triable issues

[22] The third issue is premised on the ground that there are triable issues in this case. According to the second defendant, there are over 20 triable issues in this case. It is to be noted that the issues described as triable issues had been raised and argued extensively during the hearing of the preliminary issue. These issues were considered and rejected and the preliminary issue was decided in favour of the plaintiff. In the circumstances, I accept the submission of the plaintiff that the matters raised by the second defendant are not triable issues that warrant a dismissal of the application.

[23] The second defendant further contended by that it was significant to note that the alleged lease pursuant to which the plaintiff had leased the machinery to the first defendant had expired on 31 January 2008, some six months before his appointment as receiver and manager. It was said that the conduct of the plaintiff in not taking possession of the machinery after the expiry of the lease, was suspicious and ought to be investigated. In view of my

decision on the preliminary issue, this is an unmeritorious argument.

Whether trespass committed

[24] The fourth issue is based on the elements that constitute the tort of trespass. The position taken by the second defendant is that the plaintiff has no title to sue for trespass as at the time of the alleged trespass, he was not in possession of the machinery. An action based on trespass can only be maintained, it was argued, where there was unlawful disturbance of the possession of goods by seizure or removal. In the present case, there was no evidence that the second defendant had seized or removed the machinery from the possession of the plaintiff. It was argued that consequently no action based on trespass can be maintained.

[25] The submission by the second defendant finds support in *Clerk & Lindsell on Torts* (20th Ed) where the author states that a person can only maintain a claim in trespass if he was in possession of the goods at the time of interference. The authorities on this point show that the law requires a person to be in actual possession in order to be able to maintain title to sue. I therefore agree with the second defendant that the plaintiff's cause of action based on trespass is unmaintainable as the machinery was not in the possession of the plaintiff at the material time.

Whether conversion committed

[26] On the fifth issue based on conversion, I accept the submission of the second defendant that there was no conversion based on the transaction that he had entered into with Seri JB Enterprise to sell the machinery. It is not in dispute that the sale was aborted and the machinery was never delivered to Seri JB Enterprise pursuant to the agreement to sell. The plaintiff was eventually permitted by the second defendant in May 2013 to remove it from the factory. In order to constitute conversion the law requires that there must be delivery of the machinery to the purchaser. A mere bargain and sale without delivery is not conversion. All this is familiar territory, and no citation of authority is needed. The plaintiff has not lost the machinery as it has not been irreversibly converted by the sale and is now in his possession.

[27] The undisputed facts show that from July 2008 to May 2013, upon his appointment as receiver and manager, the second defendant had taken possession of the machinery that was in the first defendant's factory. He took the position that it belonged to the first defendant and exercised dominion over it and deprived the plaintiff of temporary possession and use of the same, and attempted to sell it. This was done despite being notified by the plaintiff that the machinery belonged to him.

[28] The plaintiff contended that these facts constituted conversion. It appeared from the submissions filed by the plaintiff that he was relying on conversion in the form of category (a) and (d) as stated above at [14].

[29] In my judgment, the form of conversion relevant to this case is category (a); conversion by taking possession of another's goods with the intention of asserting dominion over them and/or dealing with them in a manner inconsistent with the right of the true owner. The taking must be accompanied by an intention to exercise permanent or temporary dominion.

[30] In *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 AC 883, the Iraqi army forcibly abstracted a fleet of ten aircraft from Kuwait and caused them to be flown to Iraq with a view to their transfer to the defendants. The defendants actions in refurbishing the aircraft, re-painting them in their own colours, and insuring and registering them in their own name were held by the House of Lords to amount to conversion. Lord Nicholls in his judgment said (at p 221):

> The judicially-approved description of the tort in Clerk and Lindsell encapsulates, in different language, these basic ingredients. The flaw in lAC's argument lies in its failure to appreciate what is meant in this context by 'depriving' the owner of possession. This is not to be understood as meaning that the wrongdoer must himself actually take the goods from the possession of the owner. This will often be the case, but not always. It is not so in a case of successive conversions. For the purposes of this tort an owner is equally deprived of possession when he is excluded from possession, or possession is withheld from him by the wrongdoer.
>
> Whether the owner is excluded from possession may sometimes depend upon whether the wrongdoer exercised dominion over the goods. Then the intention with which acts were done may be material. The ferryman who turned the plaintiff's horses off the Birkenhead to Liverpool ferry was guilty of conversion if he intended to exercise dominion over them, but not otherwise: see *Fouldes v Willoughby* (1841) 8 M & W 540.

[31] The second defendant argued that as the sale of the machinery was aborted, all that he had done was to retain the machinery without authorisation. He had exercised no dominion over the machinery. He relied on the statement by the House of Lords in *Kuwait Airways* that 'mere unauthorised retention of another's goods was not a conversion of them. It had to be accompanied by an intention to keep them.' I find this submission uncompelling. The present case is not a case of mere unauthorised retention of the machinery. Neither is it a case of mere denial of the title of the plaintiff. The second defendant had attempted to sell the machinery that belonged to the plaintiff. In addition, had denied the plaintiff access and use of it until May 2013. In so doing, these wrongful acts, he had asserted rights inconsistent with the plaintiff's rights as owner. Looking at the matter, as one of principle, I

would conclude that this is a clear case of conversion. The second defendant is liable for conversion of the machinery with effect from 22 July 2008.

[32] I would like to deal briefly with one further point. As noted earlier, the plaintiff's case on conversion is also based on the unlawful retention of the machinery by the second defendant. The ordinary way of showing a conversion by unlawful retention of property is to proof that the defendant having it in his possession, refused to surrender it on demand. In order for liability under this head to attach, an unconditional demand is generally a precondition of the right of action for wrongful detention. See *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 at p 649 and *""" procphrase="""v" party2="""The Owners of and another Person Interested in the Ship or Vessel """Ta Veechai Marine""" """>The Owner of Cargo lately Laden on Board of the Ship or Vessel 'Ta Veechai Marine' v The Owners of and another Person Interested in the Ship or Vessel 'Ta Veechai Marine'* [1995] 1 CLJ 720 at p 735.

[33] The case of *Barclays Mercantile Business Finance Ltd v Sibec Developments Ltd* [1993] 2 All ER 195 concerned goods leased by the applicants to a company which went into liquidation. The applicant brought an action against the administrators for the return of the goods, and damages for conversion. In the course of his judgment, Millet J made the following observations on wrongful retention of goods. After citing passages from *Clerk & Lindsell*, he said (at p 199):

> counsel for the applicants submitted that the making of a demand was not a precondition of the cause of action for damages in conversion. But in my judgment the use of that word was not intended to contradict the opening sentence: 'Mere unpermitted keeping of another's chattel is not a conversion of it'. Demand is not an essential precondition of the tort in the sense that what is required is an overt act of withholding possession of the chattel from the true owner. Such an act may consist of a refusal to deliver up the chattel on demand made, but it may be demonstrated by other conduct, for example by asserting a lien. Some positive act of withholding, however, is required; so that, absent any positive conduct on the part of the defendant, the plaintiff can establish a cause of action in conversion only by making demand, in my judgment so much is clear from *Clayton v Le Roy* [1911] 2 KB 1031 at pp 1048, 1050, (1911–1913) All ER Rep 284 at pp 286, 288, where the need for a demand in a simple retention case is clearly stated.

Then after citing passages from the judgment of Fletcher Moulton LJ, the learned judge went on to state:

> In my judgment, that shows clearly that an overt act of withholding goods from the true owner is a condition precedent to the tort of conversion and that absent any overt act on the part of the party in possession, the true owner must establish both demand and refusal before he can establish a cause of action.

A In my judgment, therefore, to succeed in the present case, where the respondents did nothing save retain the goods and decline to give their consent for the applicants retaking possession, the applicants could not succeed in an action for conversion unless they were to establish (1) an immediate right to possession, (2) a lawful demand for redelivery and (3) unreasonable refusal to redeliver.

B

[34] In the present case, there is no evidence that a demand was made by the plaintiff to the second defendant for the return of the machinery prior to the filing of this action. I do not accept the contention of the plaintiff that the writ C itself constitutes a demand. It is important to note that this is not a case where the second defendant did nothing save retain the machinery and decline to give his consent for the plaintiff retaking possession. He had attempted to sell it and declined the plaintiff access and use of it. In the circumstance, the absence of a demand in the instant case, does not affect the plaintiff's right to maintain an D action for wrongful detention.

Agency

[35] On the issue of agency, the second defendant contended that he was an E officer and the agent of the first defendant by virtue of cl 7.03 of the debenture. As the claim against the first defendant has been withdrawn with no liberty to file afresh, the plaintiff was precluded from maintaining this action against him. I find this submission entirely unpersuasive. An officer of a company is F liable if he procures the commission of a tort by the company. On this basis a receiver may be liable in damages for conversion: see *Clough Mill Ltd v Martin* [1984] 3 All ER 982; [1985] 1 WLR 111. There is no reason in principle why a receiver and manager should not be liable for unlawful interference with goods if he procures the company to commit acts which amount to that tort. G The second defendant had taken possession of the machinery upon his appointment as receiver. He boldly attempted to sell it and also deprived the plaintiff of its use and possession. In the circumstances, I fail to see the legal or factual basis for contending that he cannot be made personally liable for the wrongful acts of the first defendant.

H

Breach of duty

[36] The seventh issue is based on negligence and breach of duty. The second defendant argued that he did not owe any duty of care to the plaintiff as he is I not a party to the debenture. His duty is only to the first defendant and the debenture holder. There is considerable force in the point made by him. I do not accept the submission advanced by the plaintiff that the second defendant owed him a duty of care to ensure that only the assets of the first defendant were sold pursuant to the debenture.

Decision on preliminary issue under appeal

[37] The eighth issue is based on the fact that there are appeals pending in the Court of Appeal. It is correct that the Court of Appeal is yet to decide whether the decision on the preliminary issue is correct. I agree with the plaintiff that it is trite law that an appeal does not operate as a stay of the decision that the machinery belongs to the plaintiff. The plaintiff is therefore entitled to make this application.

Damages

[38] I now turn to deal with the last issue. It has to do with damages. The second defendant contended that as the possession of the machinery has been restored by the plaintiff, he has suffered no loss. It was pointed out that the plaintiff placed no caveats prior to taking back the machinery and did not retain any rights to damages. In the circumstances, he is not entitled to damages as the law does not permit a person to approbate and reprobate. He cited in support the following passage from the case of *Express Newspapers plc v News (UK) Ltd and others* [1990] 3 All ER 376 at p 383:

> There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

[39] In response, the plaintiff argued, and I agree, that the plaintiff's failure to place a caveat of his intention to claim damages, cannot and does not amount to approbation and reprobation. The argument put forward by the second defendant on this point is incomprehensible as I fail to see how the plaintiff has put forward two inconsistent cases because of his failure to give notice of his intention to claim damages. In this context, it is necessary to note that there is no legal duty on a plaintiff in a conversion action, to indicate to a wrongdoer his intention to claim damages when the goods were returned to him by the latter. The liability is strict. At such, it cannot be said the plaintiff has approbated and reprobated by filing this action. The point is without merit.

[40] There is one other point which I have to deal with. It has to with the damages sought by the plaintiff in his prayer for relief. Conversion is the principal means whereby the law protects the ownership of goods. Committing this tort gives rise to an obligation to pay damages. The fundamental object of an award of damages for conversion is to award just compensation for loss suffered. This is illustrated by the decision In *Development and Commercial Bank Berhad*. The Court of Appeal has authoritatively stated that a tortfeasor is

liable for all direct loss arising naturally and directly from the wrong as conversion is a tort of strict liability. It would follow that apart from the value of the goods, a wrongdoer would also be liable for all consequential damages loss flowing directly and naturally from the wrongful conduct. See also *Perbadanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor* [1982] 2 MLJ 165; [1982] CLJ (Rep) 257 and *Kuwait Airlines*'s case.

[41] There is no absolute rule governing the date as at which damages are to be assessed in conversion or the value of the goods are to be assessed in conversion (see *Attorney-General v Blake* [2000] 3 WLR 625). The prima facie measure of damages for conversion is the market value of the goods at the time the wrongdoer expropriated them as this would represent the basic loss sustained by the owner. In cases, where the goods are returned, an owner would still be entitled to recover all losses flowing naturally and directly from the wrongdoer's acts of conversion. On the return of the goods, an owner would recover, not their value, but the damages he has sustained by the wrongful act. He would be entitled to the difference in the market value of the goods at the time of the conversion, less the value of the goods when returned and all consequential losses. A wrongdoer who has temporarily used the goods, may be required to pay damages assessed by reference to the value of the benefit he derived from his wrongdoing. This method of measuring damages is known as the 'user principle' (see *Stoke-on-Trent City Council v WJ Wass Ltd* [1988] 3 All ER 394). Where the goods are returned damaged, a plaintiff would be entitled to recover the cost of repair in addition to other losses.

[42] In *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 1 All ER 796; [1952] 2 QB 246 the defendants, wrongfully and in furtherance of their own ends, detained for 43 weeks some portable electric switchboards which were owned by the plaintiff's and were normally hired out by them in the course of their business. It was held by the Court of Appeal that the plaintiff's were entitled to recover as damages the full market rate of hire for the switchboards during the period of their wrongful detention. The majority judgments in that case held that the plaintiff's had suffered loss through being unable to hire out the switchboards to other users. Romer LJ said ([1952] 1 All ER 796 at p 801, [1952] 2 QB 246 at p 256):

> In my judgment, the three salient facts on which the assessment of damages in this case depends are, first, that the equipment of the plaintiff's which the defendants detained was profit-earning property; secondly, that the plaintiff's normally hired out the equipment in the course of their business; and, thirdly, that the defendants during the period of wrongful detention applied the property to the furtherance of their own ends.

[43] In *Sajan Singh v Sardara Ali* [1960] 1 All ER 269; [1960] AC 167. The plaintiff and the defendant concluded an illegal contract for the sale of a lorry

and jointly engaged in its unlawful and fraudulent operation contrary to certain Malaysian regulations. The defendant then removed the lorry from the plaintiff and then refused to return it. The plaintiff sued for a declaration that he was the owner and damages in detinue. The Privy Council confirmed the decision of the Malaysian Court of Appeal to the effect that the plaintiff was entitled to an order for the return of the vehicle or its value at the time it was seized by the defendant. As the lorry was not returned, it was held that he was entitled to its value.

[44] In *Kuwait Airways*'s case, six of the aircraft that had been taken by the Iraqi army were regained by the plaintiff some two years later. Lord Nicholas in dealing with the damages the plaintiff was entitled to recover observed at para 92 (at p 231):

> A person who misappropriates another's goods does so at his own risk. That is the nature of the wrong. He takes upon himself the risk of being unable to return the goods to their rightful owner. It matters not that he may be prevented from returning the goods due to unforeseen circumstances beyond his control. The reason for his non-return of the goods, or his delay in returning the goods, is neither here nor there so far as his liability to the owner is concerned. If the goods are eventually returned, thereby diminishing the financial loss suffered by the owner, this must be taken into account. But the wrongdoer's liability ought fairly to extend to compensating the owner for the loss he sustains by virtue of his temporary loss of his goods, regardless of the impact any unforeseen circumstances may have had on the wrongdoer. The loss flowing from the unforeseen circumstances should be borne by the wrongdoer, not the innocent owner of the goods. Additionally, provided the amount is not out of proportion to the value of the goods, the wrongdoer ought to reimburse the owner for any money spent on recovering the goods or carrying out necessary repairs.

[45] I now return to the present case to determine the damages the plaintiff is entitled to have. The machinery has been returned. Applying the principles discussed above, the plaintiff is clearly entitled to the deterioration the machinery has suffered while it was retained by the second defendant. The machinery was in the possession of the second defendant for about five years and during this period, the plaintiff did not have access and was unable to use the machinery. There is evidence that the plaintiff had to sell the machinery for RM200,000 as scrap value when it was regained, because it was in a state of disrepair. In addition, there is unchallenged evidence that spare parts of the machinery were discovered to be missing when the plaintiff took possession of his machinery. Accordingly, the plaintiff is entitled to recover damages for the fall in the value of the machinery (b) loss of use and (c) loss of spare parts.

[46] The plaintiff also claimed for exemplary damages. Exemplary damages or punitive damages, the terms are synonymous, stand apart from awards of

compensatory damages. They are additional to an award which is intended to compensate a plaintiff fully for the loss he has suffered, both pecuniary and non-pecuniary. They are intended to punish and deter (see *Kuddus v Chief Constable of the Leicestershire Constabulary* [2001] UKHL 29; [2002] 2 AC 122. The essence of the court's discretionary jurisdiction to award exemplary damages is conduct in outrageous disregard of a plaintiff's rights. It can be awarded, ultimately in the interests of justice, to punish and deter outrageous conduct on the part of a defendant. In my judgment, this is not a case for exemplary damages.

CONCLUSION

[47] For the reasons given, I allow the application and direct that damages be assessed before the registrar. I further order the second defendant to pay costs in the sum of RM20,000.

Application allowed with costs in the sum of RM20,000.

Reported by Kohila Nesan